Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Section 251 Unbundling Obligation of Incumbent Local Exchange Carriers	)	**CC Docket No. 01-338**
	)	
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	**CC Docket No. 96-98**
	)	
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	**CC Docket No. 98-147**

COMMENTS OF MPOWER COMMUNICATIONS CORP.

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I. INTRODUCTION

Mpower Communications Corp. ("Mpower"), through its undersigned counsel, hereby respectfully submits these comments in response to the Federal Communications Commission's ("FCC" or "Commission") Report and Order and Order on Remand and Further Notice of Proposed Rulemaking ("FNPRM") in the above-referenced consolidated proceeding. In the FNPRM, the Commission seeks comment on whether it should "eliminate the pick-and-choose rule and substitute an alternative interpretation of section 252(i)."[1] In addition, the Commission seeks comment on "whether an alternative interpretation of section 252(i) could restore incentives to engage in give-and-take negotiations while maintaining effective safeguards against discrimination."[2] The Commission also seeks comment on its "SGAT Condition" proposal, as discussed in further detail herein.

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1 Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98; - Deployment of Wireline Services Offering Advanced Telecommunications Capability; Report and Order and Order and Remand and Further Notice of Proposed Rulemaking, (rel. Aug. 21, 2003) ¶ 720.

2 *Id.* ¶ 724.

In order to promote competition, the Commission should neither eliminate the pick-and-choose rule nor adopt the proposed SGAT Condition. Following extensive consideration of this issue, Mpower concludes that given current telecommunications market conditions, adequate market incentives do not exist for its Flex Contract proposal to succeed. Accordingly, two days ago, Mpower formally withdrew its May 25, 2001 Flex Contract Petition,[3] which petition and the record in CC Docket No. 01-117 have been incorporated in this FNPRM.[4] If market conditions do not exist for Mpower's Flex Contract proposal, they most certainly do not exist for an elimination of the pick-and-choose rule. It must be emphasized that Mpower's May 25, 2001 Petition never sought, nor requested, that the Commission eliminate or revisit the pick-and-choose rule for the separate regime of Section 252 interconnection agreements approved by state commissions, but merely proposed that pick-and-choose would not apply to "Flex Contracts," which would be adopted in their entirety on a nondiscriminatory basis.[5] It must be remembered that the pick-and-choose rule, affirmed by the U.S. Supreme Court when last under challenge,[6] was implemented by the FCC to give meaning and force to Congress' express requirement under Section 252(i) of The Telecommunications Act of 1996 ("96 Act"). It is intended to ensure that telecommunications carriers should have access to terms of interconnection agreements approved by state commissions on a nondiscriminatory basis, or on the "same terms and conditions" as other carriers obtain. Mpower has always supported this fundamental principle with regard to approved Section 252(e) interconnection agreements.[7]

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3 *See*, October 14, 2003 letter from Douglas G. Bonner, counsel for Mpower, to Marlene H. Dortch, Secretary, CC Docket No. 01-338, *et seq.*

4 FNPRM, ¶714.

5 Mpower May 25, 2001 Petition at 8-9.

6 *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 119 S.Ct. 721, 737 (1999)

7 As Mpower stated in its July 18, 2001 Reply Comments on the Mpower May 25, 2001 Petition, under Mpower's FLEX contract model, because local exchange markets are far from being fully competitive, "ILECs will not be

Perhaps even more significant than Mpower's intention in its May 25, 2001 Petition for pick-and-choose to be preserved for Sec. 252 interconnection agreements, is what the Bell Companies themselves proposed. In the context of this further rulemaking, which appears to have been instigated by a January 17, 2003 *ex parte* letter submitted by all four Bell Companies, the Bell Companies have recently contradicted their own comments in the record in this proceeding concerning the pick-and-choose rule. In CC Docket No. 01-117, the Bell Companies have expressly disavowed any desire to have the Commission re-examine or re-visit the pick-and-choose rule for Section 252 interconnection agreements. Verizon assured the Commission that "*Verizon is not asking for such a reexamination [of pick-and-choose under 47 U.S.C. § 252(i)] here.*"[8] BellSouth similarly confessed: "*[t]he Petition does not seek and BellSouth does not advocate* that the Flex Contract would take the place of the interconnection agreement mechanisms established by Sections 251 and 252 of the 1996 Act. *Such obligations would remain in place*."[9] Therefore, although the Commission is quite right to observe that incumbent LECs "support the [Mpower] Petition,"[10] the Commission may overlook that the Bell Companies have uniformly supported the preservation of the pick-and-choose rule for Section 252 interconnection agreements in connection with Commission consideration of the Mpower May 25, 2001 Petition. Given the far weaker competitive strength of CLECs today relative to

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able to force FLEX contracts upon unwilling CLECs, *as the entire Section 251-252 process (as well as the Section 208 complaint procedure) will remain intact.* Nothing in Mpower's proposal modifies the state-based negotiation and arbitration procedures for UNE-based interconnection agreements, and it will remain in full force --so long as the state of competition justifies its continued existence." CC Docket No. 01-117, Mpower Reply Comments at 7 (emphasis added).

8 Comments of Verizon, CC Docket No. 01-117 (July 3, 2001), at 2 n.2 (emphasis added).

9 BellSouth Comments on Mpower's Petition for Forbearance and Rulemaking, CC Docket No. 01-117 (July 3, 2001) at 3 n.3 (emphasis added). *See also*, Reply Comments of the United States Telecom Association, CC Docket No. 01-117 (July 18, 2001) at 7 (agreeing with Mpower that pick-and-choose would not apply to Flex Contracts under the Mpower petition, while not advocating any re-examination of pick-and-choose for Sec. 252 interconnection agreements).

10 FNPRM, ¶718.

incumbent LECs than existed in July 2001, there is simply is no adequate justification for a re-examination of the pick-and-choose rule today for Section 252 interconnection agreements. In the context of retrenching rather than expanding facilities-based wireline competition with incumbent LECs over the past three (3) years, if promoting local competition (whether wireline or intermodal) as Congress intended under the 96 Act remains a central objective of the Commission, it serves no legitimate regulatory purpose to eliminate the pick-and-choose rule protections which ensure that all competitors have access to essentially the same state-arbitrated and negotiated interconnection terms as all other carriers.

Nevertheless, if the Commission should decide to adopt a new "Flex" contract approach, as previously proposed by Mpower, the Commission should implement such an approach, without the SGAT Condition. Further, under the current state of CLEC competition with incumbent LECs, Flex Contracts should only be in addition to, and not a substitute for, the pick-and-choose rule applying to interconnection agreements approved by state commissions under Section 252(e) of the 96 Act.

II. BACKGROUND

In May 2001, Mpower filed a Petition for Forbearance in this proceeding related to the FCC's pick-and-choose rule ("Petition"). In the petition, Mpower argued that the pick-and-choose rule as applied to Section 252(e) interconnection agreements as a sole means of negotiating intercarrier agreements impeded the type of marketplace negotiations that Congress intended to make a centerpiece of the transition from regulated monopolies to competition. At the time, as an effort to encourage more open and free-flowing negotiations between incumbents and competitors, Mpower supported the idea of "Flex" contracts. However, one of the most fundamental aspects of Mpower's concept of "Flex" contracts was that the pick-and-choose rule

should be maintained as to Section 252(e) state-approved interconnection agreements until local exchange markets are fully competitive.

At the time Mpower filed its Petition -- nearly two and one-half years ago -- even though the future of the telecommunications industry still appeared relatively bright, competitive local exchange carriers ("CLECs") continued to need protection because competition had not yet developed as anticipated by the 96 Act. As such, CLECs remain, perhaps more than ever, at a severe bargaining disadvantage with incumbent local exchange carriers ("ILECs"). In the more than two years since Mpower filed its Petition, hard times have fallen upon the telecommunications industry as a whole and the competitive relationship between CLECs and ILECs has seen little change. If anything, the position of CLECs as compared to ILECs has weakened given the downsizing of CLECs and retrenchment into fewer markets. Mpower's experiences in the market since the filing of its Petition have forced it to rethink the likelihood of success of "Flex" contracts.

III. COMMENTS

While Mpower continues to believe that it is time to move forward toward fair competition and away from the "war" between CLECs and ILECs, the approach suggested by the Commission would neither accomplish this goal nor promote competition. Although most of the incumbent LEC side of the wireline industry, and particularly the Bell Operating Companies, may want to abandon completely the Commission's pick-and-choose rule, such action would lead to greater instability and chaos in the telecommunications market.[11] Simply put, and much

[11] Any consideration of the reasonableness of the Bell Companies' desire to eliminate pick-and-choose from Sec. 252 interconnection negotiations must necessarily weigh the Bell Companies' overwhelmingly superior bargaining power. Since the 96 Act, the Bell Companies have aggrandized into four vastly larger and more powerful incumbent telephone companies, while CLECs have substantially weakened. The resources of individual CLECs pale in comparison to the resources available to Bell Companies to delay or litigate disputes. The Bell Companies also have successfully sidestepped any merger commitments they once made to compete out-of-region in each other's region as facilities-based competitors, now a distant promise in return for

as Mpower wishes it were the case, competition has not developed to the point where CLECs have sufficient bargaining power to negotiate meaningful "Flex" contracts.

In fact, given the still nascent state of competition in the telecommunications market, the Commission's pick-and-choose rule is the only way CLECs, both struggling competitors and new entrants, can in any sense maintain some type of equal footing with ILECs with respect to bargaining power. If ILECs are not required to offer pick-and-choose to CLECs, ILECs will possess the power to force CLECs to arbitrate every issue of importance, thus substantially driving up the cost of, and delaying, entry and expansion. Forcing arbitration is an effective delay tactic. After doing so, ILECs will offer all of the products and services a CLEC may want with service guarantees at a much higher price through special access.

Commission approval of their huge mergers (SBC/American; Bell Atlantic/NYNEX; Bell Atlantic/GTE). Short-term merger conditions which included providing pro-competitive access to multistate negotiated interconnection terms, multistate agreements, and out-of-region negotiated agreements, and agreement to enter major out-of-region markets, have since expired. The conditions to enter major markets outside of SBC/Ameritech's and Bell Atlantic/GTE's regions "as a facilities-based competitive provider of local services" were intended to "ensure that residential consumers and business customers outside of SBC/Ameritech's [or BA/GTE's] region benefit from increased facilities-based local competition." Commission Press Release, *FCC Approves SBC-Ameritech Merger Subject to Competition-Enhancing Conditions* (Oct. 6, 1999) at 6; *see also, In re Application of GTE Corporation and Bell Atlantic Corporation, et al.*, CC Docket No. 98-184, Memorandum Opinion and Order, (rel. June 16, 2000) ¶¶ 321, 322; *In re Applications of Ameritech Corp. and SBC Communications, Inc., et al.*, CC Docket No. 98-141, Memorandum Opinion and Order, (rel. October 8, 1999), ¶¶ 398, 399 (requiring SBC and Ameritech "to redeem their promise that their merger will form the basis for a new, powerful, truly nationwide multi-purpose competitive telecommunications carrier." The Commission "also stated its anticipation that "this condition will stimulate competitive entry into the SBC/Ameritech region by the affected incumbent LECs.") Certainly, significant out-of-region facilities-based local exchange competition between the Bell Operating Companies beyond their minimal and short-lived merger commitments, has simply not materialized, though major markets out-of-region unquestionably exist for each of them. The Bell Companies' preferred strategy has always been clear, in conjunction with the US Telecom Association, to crush in-region local exchange competition that relies on Sections 251 and 252 of the 96 Act. Therefore, regulatory and legislative initiatives such as Tauzin-Dingell legislation, to eliminate all wholesale access to their networks, to petition to prematurely eliminate high-capacity UNE facilities, to obtain relief from providing access to broadband facilities, to eliminate the Commission's TELRIC methodology, and most recently to seek an unprecedented judicial order of mandamus against portions of the Commission's Triennial Review Order with which the Bells do not approve, are the order of the day. The renewed attack on pick-and-choose by all four Bell Companies in their January, 17, 2003 *ex parte* letter (*see,* FNPRM, ¶719) must now be added to this mix. This direct attack on pick-and-choose betrays the "safety net" principle upon which Mpower's Flex Contract proposal was predicated, a principle which the Bell Companies embraced. While the Bell Companies have always been unfriendly to "pick-and-choose," they offer no concrete proposals for adequate "safety net" protections akin to the pick-and-choose rule if the Commission were to eliminate the rule.

Mpower's experience and observations over the past two years have forged these concerns. For example, the difficulties that CLECs have already experienced negotiating "Flex" contracts illustrate the lack of incentives for ILEC concessions. ILECs currently offer the equivalent of a "Flex" contract for access services. The give-and-take expected in negotiating a "Flex" contract would not be much different than negotiating an access contract. For access contracts, the only way the ILEC will agree to provide cost-effective rates is if the CLEC commits to large volumes and lengthy terms. The ILECs have no incentive to offer a competitive price to new entrants or companies that are smaller than the ILECs' large customers because doing so would place downward pressure on the ILECs' retail prices. The same holds true for other "Flex" contracts.

Mpower recently encountered this scenario when it attempted to negotiate an access contract with SBC. SBC offered Mpower an MVP contract with minimum usage requirements of $2 million per month. SBC would not include loops in the aggregate spending requirement. The aggregate spending requirement was only for transport. Although Mpower requested a lower minimum spending threshold, SBC would not agree to such a term ostensibly because AT&T and WorldCom would then demand lower prices or smaller volume commitments. Thus, there is no reason to believe that small CLECs will have any leverage to negotiate more favorable terms if ILECs are allowed to offer "Flex" contracts.

"Flex" contracts also can encourage ILEC bad behavior and force CLECs to buy certain UNEs at access prices if they want ubiquitous access. A perfect example is the T-1 "no facilities" issue recently clarified by the FCC in the Triennial Review Order ("TRO").[12] Prior to the TRO, Verizon and SBC routinely denied Mpower access to UNE loops because of the need

[12] *Id.* ¶¶ 630-648.

to place a line card or a mid-span repeater on the line. However, both Verizon and SBC willingly provided the same service through their special access tariffs, which resulted in price increases as great as 150%.

The "no facilities" issue is another example of how ILECs continue to look for ways around their obligations under the 96 Act. If "Flex" contracts replace the "pick-and choose" rule, CLECs can expect ILECs to continue to find creative ways to make it more difficult for CLECs to purchase UNEs, as Mpower has already experienced, and instead, to divert a CLEC's need for such products into "Flex" contracts at less desirable terms and in negotiations for which, as discussed above, CLECs currently have little leverage.

Moreover, Mpower's concerns are not nullified by the Commission's proposed SGAT Condition. The Commission explains the SGAT Condition as follows:

> If the incumbent LECs do not file and obtain state approval for a SGAT, the current pick-and-choose rule would continue to apply to all approved interconnection agreements between the incumbent LEC and other carriers. If incumbent LECs do file and obtain state approval for a SGAT, however, the current pick-and-choose rule would apply only to the SGAT, and all other interconnection agreements would be subject to an "all-or-nothing" rule requiring carriers to adopt interconnection agreement in their entirety.[13]

While the Commission states that the SGAT Condition would "guarantee competitors access to a minimum set of terms and conditions for interconnection and access to UNEs or resale (or services provided pursuant to Section 251),"[14] Mpower believes the SGAT Condition would further handicap CLECs' efforts to compete as the state approved-SGATs are likely to become quickly archaic and, as experience has shown, ILECs are unlikely to honor all of the SGAT terms.

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[13] *Id.* ¶ 725.

[14] *Id.*

State-approved SGATs present significant weaknesses as compared to the pick-and-choose of interconnection agreements. For example, once a state approves a SGAT, the terms and conditions of the SGAT will easily become stale and dated as ILECs will have no incentive to update the terms and conditions. SGATs will quickly devolve from state-of-the-art to antiquated, and thus potentially anticompetitive, documents. CLECs will be able to obtain the best interconnection terms through the use of the pick-and-choose rule --which help them remain competitive with others-- and the negotiation and arbitration of an interconnection agreement, not by a SGAT that may receive little state agency review.

In addition, SGATs will provide little protection to CLECs that the ILECs will actually honor the SGAT once approved. The Commission need not look far and wide to find examples of large incumbents who have not only willfully and freely violated Sec. 252(i) and the pick-and-choose rule. But more appalling still --and highly troubling given the Commission's consideration of an SGAT condition mechanism-- is that they have violated their own negotiated contractual agreements to "Most Favored Nation" (MFN) clauses, or to make alternative contractual terms available to telecommunications carriers on demand by the other party, by reneging on those contractual agreements.

As just one example, in 2000, after two full years of state regulatory litigation, both the Kentucky Public Service Commission and the Tennessee Regulatory Authority found BellSouth in violation of negotiated MFN language in an interconnection agreement, which allowed the CLEC, Hyperion Telecommunications, at its option to obtain sections of other carrier agreements consistent with the principles of Section 252(i).[15] In both cases, BellSouth

[15] *In the Matter of American Communications Services of Louisville, Inc. d/b/a e.spire Communications, Inc., American Communications Services of Lexington, Inc. d/b/a e.spire Communications, Inc., ALEC, Inc. and Hyperion Communications of Louisville, Inc. f/k/a Louisville Lightwave v. BellSouth Telecommunications, Inc.,* Order, KY PUC Case No. 98-212*;* 2000 Ky. PUC LEXIS 1005 (May 16, 2000); *In Re: Complaint of AVR of*

simply refused to allow a CLEC to exercise its contractual right to adopt "local interconnection" terms of another approved and effective interconnection agreement.

The Kentucky and Tennessee decisions highlight the fact that circumstances arise where CLECs need the protection of the pick-and-choose rule or, at a minimum, the ability to obtain the benefits of other approved interconnection agreements. These cases also illustrate that the Regional Bell Operating Companies, due to their size and power, are more than willing to engage in a "war of attrition" with smaller competitors to litigate rather than comply with the law and the express terms of their interconnection agreements. Ultimate regulatory victory by the smaller CLEC is typically pyrrhic (Hyperion Telecommunications' successor, Adelphia Business Solutions, has since filed for Chapter l1 bankruptcy protection) and has frustrated Congress' intent to foster robust and vibrant local wireline competition to the incumbent LECs. Regulatory protections remain essential for CLECs to prevent similar discriminatory efforts by incumbent LECs to restrict making state-approved Section 252 interconnection agreements equally available to all carriers.

These real examples of incumbent LEC interconnection agreement abuses, and increasingly unequal bargaining power, explain why Mpower has withdrawn its Flex Contract proposal on October 14, 2003,[16] and why it is urging the Commission to preserve the pick-and-choose rule as opposed to the illusory protection of an SGAT Condition. The MFN clauses referenced above are an example of the rights that any Commission pick-and-choose rule should,

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Tennessee, LP d/b/a Hyperion of Tennessee, LP Against BellSouth Telecommunications, Inc. to Enforce Reciprocal Compensation and "Most Favored Nation" Provisions of the Parties' Interconnection Agreement, TRA Docket No. 98-00530, Initial Order of Hearing Officer on the Merits, 2000 Tenn. PUC LEXIS 98 (Apr. 4, 2000) and Order Denying BellSouth's Petition for Appeal and Affirming the Initial Order of Hearing Officer, 2000 Tenn. PUC LEXIS 689 (Sept. 22, 2000).

[16] *See,* Mpower October 14, 2003 letter to the Commission Secretary in CC Docket No. 01-338.

at a minimum, protect in order to foster competition.[17] Without the pick-and-choose rule, CLECs would not have been able to negotiate the MFN protections in their agreements exemplified by the cited examples which have been widely negotiated between CLECs and incumbents following passage of the 96 Act. The pick-and-choose rule has helped expedite and simplify the negotiation process in hundreds if not thousands of interconnection negotiations between incumbents and competitors, when both parties have negotiated in good faith and complied with the Commission's pick-and-choose rule and Section 252(i).

IV. CONCLUSION

Mpower's recent experiences and the drastic change in the competitive landscape since the filing of Mpower's Petition in May 2001, require Mpower to urge the Commission to not abandon the pick-and-choose rule or to further deregulate intercarrier interconnection agreements under Section 252 of the 96 Act. If the Commission intends to allow ILECs to use "Flex" contracts, the option of pick-and-choose for Section 252 interconnection agreements must remain available to all telecommunications carriers, as originally intended by Mpower, and as advocated by the Bell Companies in support of Mpower's Flex Contract petition. A complete eradication of the pick-and-choose rule in exchange for "Flex" contracts will result in a further reduction in competition in the telecommunications market as CLECs will have virtually no bargaining power

[17] The BellSouth MFN interconnection agreement language at issue in the Kentucky and Tennessee cases cited above stated: "[i]n the event that BellSouth, either before of after the effective date of this Agreement, enters into an agreement with any other telecommunications carrier, including, without limitation, an agreement resulting from an arbitration pursuant to 47 U.S.C. § 252(b), (an "Other Interconnection Agreement") which provides for any of the arrangements covered by this Agreement upon rates, terms or conditions that differ in any material respect from the rates, terms and conditions for such arrangements set forth in this Agreement ("Other Terms"), then BellSouth shall be deemed hereby to have offered such arrangements to Hyperion upon such Other Terms, which Hyperion may accept as provided in Section XIX.E…." *Id.* In this case, Hyperion sought to adopt all the interrelated "local interconnection service" provisions of another approved interconnection agreement, not solely by operation of the pick-and-choose rule, but under a contractual MFN clause.

with which to negotiate terms and conditions necessary to develop successfully their business plans.

Likewise, Mpower urges the Commission not to adopt the SGAT Condition. Such measures would provide CLECs with little bargaining power in negotiating interconnection agreements and are likely to result in SGATs containing archaic and unsatisfactory terms and conditions. CLECs will then face the quandary of accepting a stale or unuseful SGAT with the mere hope of substituting other more pro-competitive provisions, which is unlikely given the ILECs' disproportionately high bargaining power, or to accept other whole interconnection agreements which likely contain a "poison pill." Under either circumstance, competition will suffer. Mpower respectfully requests that the Commission neither eliminate the pick-and-choose rule nor adopt the proposed SGAT Condition.

Respectfully submitted,

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